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No. 89-1731

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1990

TODD PATTERSON, PETITIONER

v.

FEDERAL BUREAU OF INVESTIGATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a law enforcement agency complied with the Privacy Act in maintaining records relevant to an authorized investigation when that statute permits maintenance of records "pertinent to and within the scope of an authorized law enforcement activity * * *" (5 U.S.C. 552a(e)(7)).

2. Whether the courts below correctly found that they could resolve the merits of petitioner's Privacy Act claim in part on the basis of *in camera* review of materials showing that no violation occurred.

3. Whether petitioner's unsubstantiated claim of interference with his mail by an unknown government agent or agency was properly rejected.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	10
Conclusion	19

TABLE OF AUTHORITIES

Cases:

Albright v. *United States*, 631 F.2d 915 (D.C. Cir. 1980) 12

American Friends Service Comm. v. *Webster*:

485 F. Supp. 222 (D.D.C. 1980) 13

Civ. No. 79-1655 (D.D.C. Sept. 8, 1986) 13

Arieff v. *Department of the Navy*, 712 F.2d 1462 (D.C. Cir. 1983) 16, 17

Association for Reduction of Violence v. *Hall*, 734 F.2d 63 (1st Cir. 1984) 17, 18

Bane v. *Spencer*, 393 F.2d 108 (1st Cir. 1968), cert. denied, 400 U.S. 866 (1970) 18

Clarkson v. *IRS*:

678 F.2d 1368 (11th Cir. 1982) 11, 13

811 F.2d 1296 (11th Cir.), cert. denied, 481 U.S. 1031 (1987) 14

Curran v. *Department of Justice*, 813 F.2d 473 (1st Cir. 1987) 18

EPA v. *Mink*, 410 U.S. 73 (1973) 16

Farnsworth Cannon, Inc. v. *Grimes*, 635 F.2d 268 (4th Cir. 1980) 15, 16, 19

Halkin v. *Helms*, 690 F.2d 977 (D.C. Cir. 1982) 16, 19

Jabara v. *Webster*, 691 F.2d 272 (6th Cir. 1982), cert. denied, 464 U.S. 863 (1983) 11, 14, 17

MacPherson v. *IRS*, 803 F.2d 479 (9th Cir. 1986) 12, 14

Molerio v. *FBI*, 749 F.2d 815 (D.C. Cir. 1984) 15, 16, 17, 19

Nagel v. *Department of HEW*, 725 F.2d 1438 (D.C. Cir. 1984) 14

Cases—Continued: Page

Paton v. *LaPrade*, 524 F.2d 862 (3d Cir. 1975) 15
Pollard v. *FBI*, 705 F.2d 1151 (9th Cir. 1983) 15, 16
Salisbury v. *United States*, 690 F.2d 966 (D.C. 1982) 15
Stein v. *Department of Justice*, 662 F.2d 1245 (7th Cir. 1981) 15
United States v. *Reynolds*, 345 U.S. 1 (1953) 16
United States v. *Zolin*, 109 S. Ct. 2619 (1989) 16
Weinberger v. *Catholic Action*, 454 U.S. 139 (1981) 19
Wisnewski v. *United States*, 353 U.S. 901 (1957) .. 15

Constitution, statutes, regulations and rules:

U.S. Const.:
Amend. I 3, 7, 8, 11, 14, 17, 18
Amend. IV 3, 8, 18
Amend. V (Due Process Clause) 15
Freedom of Information Act, 5 U.S.C. 552(a) (4) (B) 8, 16
Privacy Act of 1974, 5 U.S.C. 552a:
5 U.S.C. 552a(e) (1) 11
5 U.S.C. 552a(e) (7) 7, 10, 11, 12, 13, 14, 15
28 U.S.C. 533 12
42 U.S.C. 1983 ..... 17, 18
Exec. Order No. 12,333, 3 C.F.R. 200 (1981 comp.) 12
Fed. R. Civ. P.:
Rule 12(b) (2) 5
Rule 56 15

Miscellaneous:

120 Cong. Rec. 36,957 (1974) 11
46 Fed. Reg. 59,949 (1981) 12
H.R. Rep. No. 1416, 93d Cong., 2d Sess. (1974) 11
S. Conf. Rep. No. 1200, 93d Cong., 2d Sess. (1974) .. 16
S. Rep. No. 854, 93d Cong., 2d Sess. (1974) 16
S. Rep. No. 1183, 93d Cong., 2d Sess. (1974) 12

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OPINIONS BELOW

The decision of the court of appeals (Pet. App. 1a-47a) is reported at 893 F.2d 595. The decision of the district court (Pet. App. 48a-113a) is reported at 705 F. Supp. at 1033.

JURISDICTION

The judgment of the court of appeals was entered on January 8, 1990. A petition for rehearing was denied on February 7, 1990. Pet. App. 130a-131a. The petition for a writ of certiorari was filed on May

8, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1983, petitioner, then an elementary school student, wrote to numerous foreign governments as part of an educational project. He enclosed much of his correspondence in envelopes bearing the return address of "Laboratory Disposable Products," a business operated by his parents. Pet. App. 4a-5a. The large amount of this international correspondence came to the attention of respondent Federal Bureau of Investigation (FBI) through classified means, and the agency opened an investigation. An FBI Special Agent visited petitioner's home and spoke to his mother and father, thereby learning the innocent nature of petitioner's correspondence. Pet. App. 5a.

After the Special Agent's visit to petitioner's home, the FBI changed the name of the relevant record in its internal files from "Laboratory Disposable Products" to "Todd Patterson," and described the nature of petitioner's project. The agency concluded that no further investigation was appropriate. Pet. App. 6a-7a.

In April 1987, petitioner requested from FBI headquarters copies of his "personal file" under the Freedom of Information Act (FOIA). Pet. App. 8a. The FBI responded in August 1987 that the information pertaining to him in FBI headquarters files was exempt from release pursuant to the FOIA and the Privacy Act, under provisions exempting classified material from disclosure. Pet. App. 58a-59a.

The Department of Justice reviewed the FBI's determination and assured petitioner that there was no derogatory material about him in the FBI files. C.A. App. 134. It also released in redacted form some of

the records, but the rest of the file remained classified. C.A. App. 136. The disclosed documents made clear that, once the FBI had determined the nature of petitioner's correspondence, it had no intention of continuing its investigation. C.A. App. 140-141. Petitioner subsequently presented a second FOIA request to the Newark FBI office. Pet. App. 8a-9a; Pet. App. 60a.

2. Petitioner filed this suit in May 1988 against the FBI and an unknown agency and employee of the United States. Petitioner complained that the FBI had failed to comply with the FOIA and the Privacy Act. Pet. App. 299a-303a. He also alleged that, since 1983, his mail had been illegally opened and damaged in violation of the First and Fourth Amendments and various statutory provisions. Pet. App. 303a-306a. Petitioner requested disclosure of his entire FBI file under the FOIA, damages and injunctive relief under the Privacy Act, an injunction against the claimed obstruction and surveillance of his mail by the government, and the expunging of any records gathered as a result of surveillance activities. Pet. App. 299a-306a.[1]

In response to the complaint, the government offered to expunge petitioner's name from its records. Pet. App. 10a. This offer has been repeated throughout the litigation, but has never been accepted by petitioner.

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[1] Although petitioner's suit originally involved only the request made to FBI Headquarters in Washington, D.C., the parties and the district court treated petitioner's second FOIA request as part of the case too. The FBI responded to that request by releasing some further information, and withholding other material under the FOIA exemptions covering classified material and records whose release would violate privacy interests. See Pet. App. 60a.

Petitioner sought discovery from the government regarding FBI investigative activities, including information concerning the types and meanings of internal markings the FBI uses on its files; the content of files the government maintains on him, his parents, and their family business; the reason these files were created, and whether the FBI investigates those who engage in foreign correspondence; the way the FBI learned of his correspondence; and whether there had been any wiretap on the Patterson telephone.[2] See Pet. App. 255a-285a. Some of the information sought by Patterson was provided in answers to interrogatories and in affidavits by FBI Special Agents. See *ibid.* However, as to questions delving primarily into the counterintelligence investigative techniques of the FBI, the United States invoked the state secrets privilege against disclosure. Pet. App. 256a-264a, 273a, 280a-285a.

In support of its FOIA exemption claims regarding the FBI files, an FBI Special Agent affirmed that he had personally examined the withheld material and confirmed that it concerns intelligence sources and methods. C.A. App. 95-96. He also explained that proper classification procedures had been followed. C.A. App. 96-97. The Special Agent then described in considerable detail each of the documents that were withheld in whole or part, and the reasons for their non-disclosure. C.A. App. 98-117. He explained the harm resulting from disclosure of intelli-

[2] During the litigation, petitioner's mother asserted that, beginning in 1983, she had heard strange noises on her telephone. Pet. App. 247a. She also related that a now-deceased former employee had claimed in 1986 that he heard a voice on the Pattersons' business telephone line indicating that it was not the telephone that was meant to be "tapped." Pet. App. 249a.

gence sources and methods, as well as the internal FBI file markings. The FBI also declared that the agency's files did not indicate that the Patterson premises had ever been subject to electronic surveillance. An FBI Special Agent attested that the FBI files showed that the agency did not intercept or open any mail directed to the Pattersons. Pet. App. 16a-17a; C.A. App. 254-255.[3]

The government moved for summary judgment on petitioner's first and second causes of action, and moved to dismiss the third cause of action under Fed. R. Civ. P. 12(b)(2). Pet. App. 10a.

In December 1988, the district court ordered the government to submit in unredacted form certain of the documents at issue for an *in camera* inspection so that the court could "assure itself that the FBI has acted in good faith with regard to its investigation of [petitioner], that the FBI complied with all relevant government regulations, and that the FBI engaged in no illegal conduct." Pet. App. 115a. In response, the government submitted for *in camera* inspection *all* of the unredacted documents at issue, an additional explanatory declaration by James Geer, the FBI Assistant Director then in charge of the Intelligence Division, and a Declaration and Claim of Privilege from the Attorney General.[4]

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[3] In addition, the government told petitioner that the FBI had not supplied information regarding him to any individual or agency. Pet. App. 277a. The government also stated without equivocation that no investigation or inquiry regarding petitioner had been conducted after a Special Agent visited petitioner's home and discovered the innocent nature of his project. Pet. App. 278a.

[4] The Attorney General declared that he had "personally determined that [the information at issue], if disclosed, could damage the national security of the United States." C.A.

After conducting an *in camera* inspection of the documents and the Geer declaration, the district court granted judgment in favor of the government on all three of petitioner's causes of action. Pet. App. 48a-113a. The court found first that proper procedures were followed in classifying the material at issue (Pet. App. 69a) and confirmed that the "withheld material, read in conjunction with the Greer [*sic*] affidavit, does establish a logical connection between each withheld or redacted document and the risk that certain intelligence methods or sources would be compromised if the withheld material was released." Pet. App. 75a-76a.[5] Noting that "[a]t first blush, the investigation appears ludicrous," the district court found that the circumstances of petitioner's mailings could be expected to prompt the FBI to investigate the matter "using properly classified intelligence sources and methods." Pet. App. 78a. The court concluded that the subject files were properly exempted from disclosure under the FOIA.

App. 299. The Attorney General cautioned that damage to the national security can reasonably be expected to occur even when "isolated segments" of intelligence information are revealed because such segments can be collected over time and combined so as to make possible identification of intelligence sources, methods, and activities. C.A. App. 300.

[5] The court found no evidence of agency bad faith, noting that the allegations concerning damaged mail did not create a genuine factual issue of whether any United States agency interfered with this mail: "[t]he distance the mail traveled, the size and content of the envelopes, and the national origin of the mail are the far more likely culprits in assessing why [petitioner's] mail may have arrived in damaged condition. Also, [petitioner's] allegation of electronic eavesdropping is not substantiated by any substantive, credible or admissable evidence * * *." Pet. App. 77a-78a.

The district court next determined (Pet. App. 89a) that the FBI had acted properly under the Privacy Act if it could show that the records it maintained on petitioner were "pertinent to and within the scope of an authorized law enforcement activity." 5 U.S.C. 552a(e)(7). The district court ruled that this statutory language is met where the facts demonstrate that all records maintained regarding an individual's exercise of First Amendment rights are "*relevant* to an authorized law enforcement activity of the agency, and that there exists a sufficient basis for the maintenance of such records." Pet. App. 93a-94a (emphasis in original).

The district court determined that the *in camera* Geer declaration established such a connection. Pet. App. 97a. The court noted that the FBI could not know prior to its investigation that petitioner was involved in nothing illegal or clandestine, but that the agency was able to determine this fact through an investigation "in the least intrusive means possible given the circumstances." Pet. App. 97a-98a.[6]

The district court next found no merit to petitioner's First Amendment claim, finding as a matter of fact that a review of the record as a whole made clear that the FBI and any government employees acted in accord with all applicable statutory and

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[6] The district court advised petitioner "that any records maintained by the FBI on him do not reflect negatively on his character or conduct. Accordingly, [it] * * * assure[d] [him] that the law enforcement activity conducted by the FBI in this case should not in any way inhibit him from pursuing any legitimate exercise of his First Amendment rights, including writing letters to countries throughout the world. Furthermore, [petitioner's] fear of an aborted or limited public service career arising out of these events is misplaced." Pet. App. 99a-100a.

regulatory guidelines and that such action did not impermissibly chill petitioner's First Amendment rights. Pet. App. 104a-107a.

The court also rejected petitioner's Fourth Amendment claim that some government agency had improperly opened his mail. Pet. App. 107a. The court found that the public record and its *in camera* review showed that the FBI had conducted no illegal searches, and that the Attorney General had properly invoked the state secrets privilege to defeat petitioner's attempt to trawl for evidence of wrongdoing by some other unknown federal agency. Pet. App. 107a-109a. Similarly, the court found no evidence of governmental violation of statutes prohibiting interference with the mails, and confirmed that petitioner's discovery attempts on this point also were precluded by the state secrets privilege. Pet. App. 110a-111a.

Shortly after the district court's ruling, petitioner sought reconsideration, arguing that the court had erred in relying on the government's *in camera* submissions. On March 30, 1989, the court denied this motion, noting that the FOIA specifically provides for *in camera* submissions (5 U.S.C. 552(a)(4)(B)) and that numerous federal courts have relied upon *in camera* procedures in cases involving the FOIA, the Privacy Act, and claims of the state secrets privilege. Pet. App. 126a-129a.

3. The Third Circuit unanimously affirmed the ruling by the district court after itself conducting an *in camera* inspection of the documents at issue. During the appellate proceedings, government counsel repeated the offer to expunge petitioner's name from the files, and reiterated to the court of appeals that the FBI has no interest whatsoever in petitioner but was defending this litigation in order to protect a

valuable intelligence source or method. See, *e.g.*, Pet. App. 10a n.5; C.A. Tr. 27-29.

The court of appeals first held that the district court had followed proper procedures in conducting an *in camera* review because "the public submissions represent a good faith effort by the FBI to provide as much access to the information as possible." Pet. App. 19a-20a. The appellate court also agreed that the record showed that the FBI had correctly followed classification procedures here (Pet. App. 23a) and had withheld classified material properly under the exemptions provided by the FOIA (Pet. App. 26a-29a).[7]

After reviewing decisions by four other circuits, the Third Circuit confirmed the conclusion that no Privacy Act violation had occurred as a result of the FBI's creation and maintenance of files here. The court held that the FBI had made the necessary showing that "[its] records * * * on [petitioner's] exercise of First Amendment rights are relevant to an authorized law enforcement activity of the FBI." Pet. App. 34a-38a.

Reaching petitioner's third cause of action, the Third Circuit noted that the district court had concluded that the FBI and all FBI and government employees had acted in accord with all statutory, regulatory, and administrative guidelines, and that the invocation of the state secrets privilege prevented further discovery regarding the intelligence source and method at issue. Pet. App. 38a-43a. The court of appeals held that the district court had committed a harmless procedural error on this point by treating

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[7] The court of appeals also assured petitioner that there is nothing in the FBI files that is in any way derogatory. Pet. App. 26a n.10.

the government's motion to dismiss for lack of personal jurisdiction as one for summary judgment. Treating the jurisdictional question as one that implicated the merits of the case as well, the court of appeals confirmed that, because the record contains no evidence of abuse by the FBI and the state secrets privilege prevents further discovery, dismissal of the case was appropriate. Pet. App. 44a-46a.

ARGUMENT

After reviewing *in camera* the documents at issue and explanatory declarations, both courts below have found that petitioner has no cause of action here; no judge has dissented from this determination. Rather, all of the judges below have concluded that the government has acted properly in conducting its limited investigation of the unique facts of this case and then protecting a valuable intelligence source or method. This ruling is correct and is fully consistent with numerous holdings of other courts. Review by this Court is plainly unwarranted.

1. Petitioner first contends (Pet. 16-40) that the court of appeals applied 5 U.S.C. 552a(e)(7) of the Privacy Act in a manner that undermines Congress's intent in enacting the provision and conflicts with the interpretations of other circuits. His contention is without merit.

a. The Third Circuit determined that the FBI had complied with the Privacy Act because maintenance of the records here was "relevant to an authorized law enforcement activity of the agency." Pet. App. 37a.[8] That interpretation accords with the plain lan-

[8] The "law enforcement" language of Section 552a(e)(7) encompasses more than simple investigation of criminal activity, also covering authorized intelligence investigations. See

guage of Section 552a(e)(7), which prohibits federal agencies from maintaining records "describing how any individual exercises rights guaranteed by the First Amendment * * * unless [the records are] *pertinent to and within the scope of* an authorized law enforcement activity" (emphasis added).[9]

The legislative history supports a straightforward reading of the statutory text. The proposed version of Section 552a(e)(7) was amended on the House floor to clarify that "such activities as are pertinent to, and within the scope of, duly authorized law enforcement activities are not meant to be excluded by the broad terms" of the section. 120 Cong. Rec. 36,957 (1974) (Rep. Ichord). The House report on Section 552a(e)(7) indicated that federal agencies were not to maintain records concerning "the political or religious beliefs or activities of any individual," unless authorized by statute. H.R. Rep. No. 1416, 93d Cong., 2d Sess. 16, 25 (1974). In addi-

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Jabara v. *Webster*, 691 F.2d 272, 280 (6th Cir. 1982), cert. denied, 464 U.S. 863 (1983).

[9] Petitioner notes (Pet. 26-28) that the standard established by Section 552a(e)(7) of the Act, which limits collection of information concerning First Amendment activities, should be more rigorous than that established by Section 552a(e)(1), which limits information generally collected by agencies. The Third Circuit's standard is not at odds with this: information collected under Section 552a(e)(7) must be relevant to "an authorized law enforcement activity"; information can be collected under Section 552a(e)(1) as long as it is relevant and necessary to accomplish, more broadly, "a purpose of the agency" set by statute or executive order. (Additionally, no records may be kept if they violate Section 552a(e)(7) even if they are not a part of an agency's "system of records"; they may be kept under Section 552a(e)(1) if they are not incorporated into the agency's "system of records." See, *e.g.*, *Clarkson* v. *IRS*, 678 F.2d 1368, 1373-1377 (11th Cir. 1982).)

tion, the Senate report on the provision that became Section 552a(e)(7) makes clear the limited purpose that Congress had in mind, noting that "[t]his section's restraint is aimed particularly at preventing collection of protected information not immediately needed, about law-abiding Americans, on the off-chance that the Government or the particular agency might possibly have to deal with them in the future." S. Rep. No. 1183, 93d Cong., 2d Sess. 56-57 (1974).

The courts below correctly found that the FBI actions here do not in any sense fit within the activity proscribed by Congress. This was not an instance of the agency monitoring a political program or activity; rather, the FBI conducted a highly limited investigation of specific action for authorized counterintelligence purposes.[10] As the record demonstrates, that investigation was quickly terminated when the innocent nature of petitioner's activity was learned, something that could not have been discovered without at least some inquiry. And, even though we have offered to expunge petitioner's name from the FBI files, maintenance[11] of the files serves an innocuous and valuable purpose. Since petitioner has kept up his correspondence with foreign governments (see Pet. 3-4), the existing files enable the agency to de-

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[10] The FBI's counterintelligence activity here was authorized under 28 U.S.C. 533 and Section 1.14 of Exec. Order No. 12,333, 3 C.F.R. 200 (1981 comp.) (*reprinted at* 46 Fed. Reg. 59,949 (1981)).

[11] Petitioner's claim (Pet. 28-31) that there exists a circuit conflict regarding the treatment of the "collection" as opposed to the "maintenance" of records under Section 552a(e)(7) is erroneous. Neither *MacPherson* v. *IRS*, 803 F.2d 479, 483-485 (9th Cir. 1986), nor *Albright* v. *United States*, 631 F.2d 915 (D.C. Cir. 1980), distinguished the standard to be applied to the two activities in analyzing Section 552a(e)(7).

termine immediately that no investigation is necessary or appropriate as petitioner's name comes to its attention through the same types of intelligence sources and methods which raised it originally.[12]

b. Contrary to petitioner's claim (Pet. 36-40), the Third Circuit's ruling is fully consistent with applications of Section 552a(e)(7) by other circuits. While describing the inquiry under Section 552a(e)(7) in slightly varying terms, the circuits appear to agree on what conduct is prohibited; each circuit would find the FBI's conduct here proper. In addition, each would reject the extremely stringent standard suggested by petitioner in the courts below that an agency cannot even maintain a file unless there is a "reasonable suspicion, based on specific and articulable facts" that the subject has committed or is about to commit a crime. See Pet. C.A. Br. 20.

Thus, in *Clarkson* v. *IRS*, 678 F.2d 1368, 1375 (1982), the Eleventh Circuit remanded a case for a determination whether the IRS had violated Section 552a(e)(7) by "engag[ing] in the practice of collecting protected information, unconnected to any investigation of past, present or anticipated violations of the statutes" which it is authorized to enforce. On remand, the district court found that the collection was permissible under Section 552a(e)(7), and this determination was upheld on appeal because the record supported the findings that the documents

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[12] Disposal of FBI records is also regulated in order to assure that materials of historical import are not destroyed, as required by the U.S. District Court for the District of Columbia. See *American Friends Service Comm.* v. *Webster*, 485 F. Supp. 222 (1980), and Civ. No. 79-1655 (Sept. 8, 1986). According to the FBI Records Retention Plan and Disposition Schedule, records are destroyed after established retention periods or are transferred to the National Archives.

maintained by the IRS "are related to investigations of illegal tax protester activities * * * [and were] in connection with legitimate law enforcement activities." *Clarkson* v. *IRS*, 811 F.2d 1396, 1397 (11th Cir.), cert. denied, 481 U.S. 1031 (1987).

The Sixth Circuit has also adopted a "relevancy" test, ruling that the government acts properly under Section 552a(e)(7) so long as its "investigation is relevant to an authorized criminal investigation or to an authorized intelligence or administrative one." *Jabara* v. *Webster*, 691 F.2d 272, 279-280 (1982), cert. denied, 464 U.S. 863 (1983); accord *Nagel* v. *Department of HEW*, 725 F.2d 1438, 1441 n.3 (D.C. Cir. 1984). The formulations of the Eleventh and the Sixth Circuits, like the Third Circuit's "relevancy" standard, all require that the government collect only information connected to legitimate law enforcement objectives. The conduct of the FBI here, an authorized counterintelligence investigation, would satisfy each circuit's formulation.

The Ninth Circuit in *MacPherson* v. *IRS*, 803 F.2d 479, 481-484 (1986), declined to formulate any one standard, emphasizing that each case entails balancing the need to avoid chilling the exercise of First Amendment rights against the need to conduct surveillance and recording of a wide range of activities, including some protected by the First Amendment. The court then approved the surveillance and recording of information concerning an individual "not suspected * * * of any past, present, or anticipated illegal conduct" (*id.* at 480) because that individual spoke at tax protester conferences. Thus, although its standard remains unarticulated, the Ninth Circuit evidently would not find the conduct at issue here unlawful because it generated information about an individual not suspected of criminal activity. There

is no need for this Court's intervention at this time, since the circuits appear to be reaching a consensus on the type of conduct permissible under Section 552a(e)(7).[13]

2. Petitioner next contends (Pet. 40-48) that the courts below violated principles of due process and Fed. R. Civ. P. 56 by relying in part on the *in camera* material to resolve petitioner's Privacy Act claim. He also asserts (Pet. 48-54) that there is a conflict among the circuits on the question whether a court can grant summary judgment based on such *in camera* procedures. Neither contention has merit.

a. The federal courts have approved use of *in camera* proceedings to resolve issues in a variety of contexts, and to rule finally on both constitutional and statutory claims. See, *e.g.*, *Molerio* v. *FBI*, 749 F.2d 815, 824-826 (D.C. Cir. 1984); *Pollard* v. *FBI*, 705 F.2d 1151, 1153-1154 (9th Cir. 1983); *Salisbury* v. *United States*, 690 F.2d 966, 973 n.3 (D.C. Cir. 1982); *Stein* v. *Department of Justice*, 662 F.2d 1245, 1255-1256 (7th Cir. 1981); *Farnsworth Cannon, Inc.* v. *Grimes*, 635 F.2d 268, 281 (4th Cir. 1980) (en banc).

It is well established that such studied use of *in camera* documents does not violate the Due Process Clause. Thus, while this Court recently noted that the "routine use" of *in camera* procedures could raise

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[13] Petitioner also asserts the relevance of *Paton* v. *LaPrade*, 524 F.2d 862 (3d Cir. 1975). That case held that certain actions by the FBI could have violated the constitutional and statutory rights of an individual, entitling her to the expunging of her FBI file. The conduct at issue in that case predated the enactment of the Privacy Act, and did not involve an inquiry into the legitimate law enforcement actions of an agency. In any event, petitioner's attempts to establish an intra-circuit conflict do not warrant this Court's attention. See *Wisnewski* v. *United States*, 353 U.S. 901, 902 (1957).

due process concerns, it confirmed the "sound discretion" of the district courts to conduct *in camera* review when warranted to establish a claim of privilege. *United States* v. *Zolin*, 109 S. Ct. 2619, 2630, 2631 (1989); see also *EPA* v. *Mink*, 410 U.S. 73, 92-93 (1973) (discussing propriety of *in camera* proceedings in FOIA case).

Indeed, Congress in the FOIA explicitly authorized *in camera* procedures as the courts rule on the *merits* of a requester's statutory claim. See 5 U.S.C. 552(a)(4)(B). Accord S. Rep. No. 854, 93d Cong., 2d Sess. 16 (1974) ("in some cases of a particularly sensitive nature [a court may] decide to entertain an ex parte showing by the government"); S. Conf. Rep. No. 1200, 93d Cong., 2d Sess. 9 (1974) ("[w]hile *in camera* examination need not be automatic, in many situations it will plainly be necessary and appropriate"). No court has held that this part of the FOIA is unconstitutional because due process prohibits resolution of the merits of a statutory claim through *in camera* proceedings. See *Arieff* v. *Department of the Navy*, 712 F.2d 1462, 1469 (D.C. Cir. 1983) (FOIA *in camera* review provision was merely a statutory confirmation of a power that the courts already possessed); see, *e.g.*, *Pollard*, 705 F.2d at 1153-1154 (resolving summary judgment motion).

Likewise, a claim of state secrets privilege is frequently considered *in camera*. See *United States* v. *Reynolds*, 345 U.S. 1, 10 (1953); see, *e.g.*, *Farnsworth Cannon*, *supra*. The privilege requires dismissal when it rebuts a plaintiff's prima facie case or when the action cannot be litigated without exposing the privileged information. See *Molerio*, 749 F.2d at 825; *Halkin* v. *Helms*, 690 F.2d 977, 997-1001 (D.C. Cir. 1982); *Farnsworth Cannon*, 635 F.2d at 281.

Resolution of Privacy Act claims often raises similar concerns about the disclosure of highly sensitive information and interests of national security; courts have therefore allowed Privacy Act claims to be determined on their merits on the basis of *in camera* review of documents. See *Molerio*, 149 F.2d at 825-826 (privileged material reviewed *in camera* to resolve summary judgment motion); *Jabara*, 691 F.2d at 274, 280 (use of *in camera* material approved; left to district court discretion on remand). Like the other cases involving national security and privacy claims, these cases present unique demands: a court can neither disclose the very information sought to be protected nor punish the government for protecting the public interest by keeping sensitive information secret. Rather, "courts have been charged with the responsibility of deciding the dispute without altering [the] unequal condition [that one party does not know the content of the withheld material], since that would involve disclosing the very material sought to be kept secret. The task can often not be performed by proceeding in the traditional fashion, so that [the *ex parte, in camera* procedure that] * * * is a rarity among our cases generally must become a commonplace in this unique field," *Arieff*, 712 F.2d at 1471.

b. Contrary to petitioner's contention (Pet. 48-51), the Third Circuit's ruling does not conflict with *Association for Reduction of Violence* v. *Hall*, 734 F.2d 63 (1st Cir. 1984). *Hall* did not involve the Privacy Act; it concerned a ruling resolving the merits of a cause of action brought under 42 U.S.C. 1983 alleging a retaliatory transfer of prisoners for First Amendment protected activity. The court of appeals held that summary judgment could not be premised on material covered by qualified privileges

of nondisclosure. See also *Bane* v. *Spencer*, 393 F.2d 108, 109 (1st Cir. 1968) (similar Section 1983 suit), cert. denied, 400 U.S. 866 (1970). Unlike this case and those cited above, *Hall* did not involve the special circumstances present in cases involving national security material and claims of the state secrets privilege.[14]

3. Finally, petitioner asserts (Pet. 54-64) that the courts below erred in dismissing his third cause of action, claiming that some unknown federal agent or agency had violated his First and Fourth Amendment rights by interfering with his mail.

Petitioner states (Pet. 55-56) that his allegations established that a government agent had intercepted his mail and had informed the FBI, and that his foreign incoming mail has regularly been tampered with. However, there is no evidence in the record of any kind showing, or even tending to show, that any government agent or agency has tampered with petitioner's incoming mail.[15]

To the contrary, the district court found (Pet. App. 77a, 109a-111a) that the *in camera* materials indicated that the FBI had not illegally interfered with petitioner's mail. The government's proper claim that the *in camera* material was exempt from discovery under the FOIA and the state secrets priv-

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[14] Thus, since *Hall*, the First Circuit itself has indicated that, while public affidavits and filings are preferred, *in camera* proceedings may be used to resolve the merits of FOIA cases. See *Curran* v. *Department of Justice*, 813 F.2d 473, 477 (1987).

[15] As the district court noted, "[t]he distance the mail traveled, the size and content of the envelopes, and the national origin of the mail are the far more likely culprits in assessing why [petitioner's] mail may have arrived in damaged condition." Pet. App. 77a-78a.

ilege prevents release of that material or further discovery into its content. See, *e.g.*, *Molerio*, 749 F.2d at 825-826; *Halkin*, 690 F.2d at 997-1001; *Farnsworth Cannon*, 635 F.2d at 281; see also *Weinberger* v. *Catholic Action*, 454 U.S. 139, 146-147 (1981). Significantly, petitioner does not challenge the validity of the state secrets privilege assertion. Consequently, petitioner's third cause of action was properly rejected, because petitioner has not shown that any government agency violated his rights, and is barred from taking discovery in order to attempt to back up his otherwise unsupported claims.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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